

1  
2  
3  
4  
5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE

8 EKO BRANDS, LLC,

9 Plaintiff,

10 v.

11 ADRIAN RIVERA MAYNEZ  
ENTERPRISES, INC.; and ADRIAN  
RIVERA,

12 Defendants.

C17-894 TSZ

MINUTE ORDER

13 The following Minute Order is made by direction of the Court, the Honorable  
14 Thomas S. Zilly, United States District Judge:

15 (1) Plaintiff is DIRECTED to show cause by noon on Wednesday,  
16 September 18, 2019, why the Court should not impose sanctions for plaintiff's failure to  
17 make mandatory disclosures in discovery concerning the actual damages it seeks in this  
18 action. Federal Rule of Civil Procedure 26(a)(1)(A)(iii) requires a party to provide,  
19 without awaiting a discovery request, a "computation of each category of damages," and  
20 to make available for inspection and copying "the documents or other evidentiary  
21 material, unless privileged or protected from disclosure, on which each computation is  
22 based." Plaintiff failed to timely comply with Rule 26(a)(1)(A)(iii). Federal Rule of  
23 Civil Procedure 37(c)(1) authorizes the Court to impose appropriate sanctions for  
violation of Rule 26(a)(1)(A)(iii), even in the absence of any prior motion by the  
opposing party to compel discovery. *See Toyrrific, LLC v. Karapetian*, 606 Fed. App'x  
365 (9th Cir. 2015). Plaintiff also failed to timely comply with Federal Rule of Civil  
Procedure 33. In response to defendants' interrogatory seeking the "factual and legal  
basis" for plaintiff's damages, plaintiff indicated merely that it wants "damages sufficient  
to compensate [it] for all injury sustained," including the disgorgement of defendants'

1 profits. See Pla.’s Resp. to Interrogatory No. 15 (docket no. 118-2). Plaintiff did not  
2 supplement this response. In August 2018, defendants moved for summary judgment on  
3 the ground that, among other things, plaintiff had produced no evidence of actual  
4 damages. See Defs.’ Mot. at 17-18 (docket no. 33). In response to the dispositive  
5 motion, plaintiff presented arguments about the disgorgement of defendants’ profits, but  
6 did not mention any of the components of actual damages that it now seeks, namely  
7 diminution in goodwill, lost profits, and/or the expenses of corrective advertising. See  
8 Pla.’s Resp. at 20-21 (docket no. 52). According to defendants, the first time plaintiff  
9 mentioned loss of goodwill and the costs of corrective advertising was during the  
10 telephonic conference held on September 13, 2019, four days after the Pretrial  
11 Conference and the last judicial day before trial. See Defs.’ Resp. at 1 (docket no. 116).  
12 Given the procedural history and posture of this case, the Court rejects plaintiff’s  
13 suggestion that defendants are somehow precluded from objecting to plaintiff’s request  
14 for actual damages by not moving to compel plaintiff to answer Interrogatory No. 15  
15 and/or by not noting under Federal Rule of Civil Procedure 30(b)(6) the deposition of  
16 Christopher Legler, who signed the verification for plaintiff’s response to Interrogatory  
17 No. 15, see docket no. 118-2, and who, when asked about the subject in his deposition on  
18 July 17, 2018, testified that plaintiff’s “damages sufficient to compensate” was “not a  
19 calculable number right now” and that he did not have “a number in front of [him] right  
20 now.” Legler Dep. at 65:17-25 (docket no. 115-1). Plaintiff is hereby placed on notice  
21 that the Court considers plaintiff’s discovery violations to involve the willfulness, fault,  
22 and/or bad faith required to impose severe sanctions, including precluding the use as  
23 evidence at trial of all materials and testimony that should have been disclosed under  
Rules 26(a)(1)(A)(iii) and/or 33, informing the jury about plaintiff’s violations of the  
Federal Rules of Civil Procedure, striking or dismissing with prejudice plaintiff’s prayer  
for actual damages, and/or requiring plaintiff to pay defendants the reasonable attorney’s  
fees and costs caused by plaintiff’s and/or its attorneys’ conduct. See Fed. R. Civ. P. 37;  
see also *Tablizo v. City of Las Vegas*, 720 Fed. App’x 875 (9th Cir. 2018); Jay E. Grenig  
& Jeffrey S. Kinsler, HANDBOOK FED. CIV. DISCOVERY & DISCLOSURE § 12:12 (4th ed.  
2016).

16 (2) The Clerk is directed to send a copy of this Minute Order to all counsel of  
17 record.

18 Dated this 16th day of September, 2019.

19 William M. McCool  
20 Clerk

21 s/Karen Dews  
22 Deputy Clerk  
23